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# What It's Worth To Do Your Best

Andrew Tettenborn\*

It may seem a curious thing to say about an acknowledged golden oldie of the contracts class, but if you stand back for a moment from the decision in *Wood v. Lady Duff-Gordon*<sup>1</sup> you quickly see that there should not have been anything very difficult about the case. Lady Duff-Gordon's story was effectively this: she had, in a signed document of some length and formality, deliberately promised her exclusive endorsement for one year to Otis F. Wood, a professional promoter of designer clothes, in exchange for precisely no commitment at all on his part.<sup>2</sup> For an experienced businesswoman and successful fashionista<sup>3</sup> this was, to say the least, rather disingenuous<sup>4</sup>—a disingenuousness matched only by the demerit of her subsequent conduct in deciding to play the New York couture market as a whole for whatever she could get. It did not require a Cardozo to see that there must be something wrong, make the obvious point about Mr. Wood's implicit obligation to use his best endeavors to promote the Lucile brand, and give judgment in his favor.

There is, however, another slightly less obvious reason why deciding *Wood* was intellectually easy. All Judge Cardozo had to do in order to defeat a pettifogger's consideration point and allow a deserving plaintiff to sue for breach of contract was to find a "best efforts" obligations of some sort. Provided *some* obligation, however small, existed, he did not have to go further and discuss what it entailed, or think about what measure of

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1. 118 N.E. 214 (N.Y. 1917).

2. *Id.* at 214.

3. And one who had previously done business in the United States, though on an earlier business trip some five years beforehand she had arrived in rather less grand style than she had hoped—namely, as a bedraggled, though fortunate survivor from the *Titanic*.

4. See Melvin A. Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1025 (1998) (arguing that Lady Duff-Gordon's actions were not disingenuous).

damages would have been available had it been broken.<sup>5</sup> But the latter point matters. As any properly primed J.D. candidate will tell you, a lawyer's client is not primarily interested in the abstract existence (or nonexistence) of a claim for breach of contract, but in the figures on the check at the end of the day.

The object of this paper is to pick up this point (on which there is less authority than one might have thought),<sup>6</sup> and discuss the measure of damages for breach of "best endeavors" obligations and the like. In other words, what if the boot had been on the other foot and it had been Lady Duff-Gordon who (having, for the sake of argument, behaved impeccably in keeping her side of the bargain) had been suing Mr. Wood for not adequately promoting her collection. Or what if it had been some other plaintiff suing for breach of some similar obligation?

My argument will be that, for a number of reasons, claiming and proving damages in a case like this is often neither easy nor straightforward for the plaintiff.

### I. The Extent of "Best Efforts"

Although this is a paper primarily discussing damages, we have to note that while establishing the existence of a "best efforts" obligation can be relatively unproblematical, its content can vary wildly, and with it what counts as a breach in the first place. Take, for example, the common example of a promise connected with a corporate acquisition to use best efforts to promote some product of the vendor. Just what does "best efforts" promotion of a product involve? Is it best efforts taking into account the business of the promisor, who no doubt has plenty of other fish to fry, or simply such efforts as are reasonable for the product taken in isolation, even if this involves skewing the defendant's business priorities by giving disproportionate weight

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5. This is not an original point. It was neatly made by Melvin Eisenberg in 1998. See Eisenberg, *supra* note 4, at 1026.

6. This may seem surprising, but the reason seems to be that many of the cases discussing broken best-efforts promises in the light of *Wood v. Lady Duff-Gordon* have involved either non-damages remedies, *Leonard v. Koval*, 543 N.E.2d 911 (Ill. App. Ct. 1989); *Huang v. BP Amoco Corp.*, 271 F.3d 560 (3d Cir. 2001), involving specific performance and rights of rescission respectively, or recovery fixed by a liquidated damages clause or standby letter of credit, *JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459 (4th Cir. 2001).

to it?<sup>7</sup> And what about a decision to discontinue selling that particular line? Although the implication of good faith in any such promise means that the promisor cannot do this for a malicious or wholly inadmissible reason,<sup>8</sup> it can be a close call, depending on the precise terms of the contract, to decide whether an otherwise unexceptionable commercial decision amounts to a breach of contract.<sup>9</sup>

Again, a best-efforts obligation may be free-standing (as it was in the *Wood* case), but it will not always be. It may in particular be joined to another more definite contractual obligation. A straightforward example of this is an agreement to take a lease of real estate, or to buy a business or other asset, which is conditional on some permission being obtained from a third party. For instance, a business is sold subject to the agreement of a financier to back it; the sale of a radio station is conditioned on the grant of a license to the buyer; or real estate is leased subject to the availability of zoning consent; but always subject in each case to the buyer being obliged to do his<sup>10</sup> best to obtain that permission. Cases such as these are closer to the late E. Allan Farnsworth's concept of agreements where the duty to perform is subject to a reasonableness criterion rather than

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7. On which the courts have reached varying results. Compare *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979), and *Aeronautical Indus. Dist. Lodge 91 v. United Techs. Corp.*, 230 F.3d 569 (2d Cir. 2000) (both imposing exacting obligations), with *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671 (2d Cir. 1983), *cert. denied*, 466 U.S. 938 (1984), and *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1373 (7th Cir. 1990) (two more freewheeling examples). See generally Daniel J. Coplan, *When is "Best Efforts" Really "Best Efforts": An Analysis of the Obligation to Exploit in Entertainment Licensing Agreements and an Overview of How the Term "Best Efforts" has been Construed in Litigation*, 31 Sw. U. L. REV. 725 (2002); Zachary Miller, *Best Efforts?: Differing Judicial Interpretations of a Familiar Term*, 48 ARIZ. L. REV. 615 (2006).

8. See *Zilg*, 717 F.2d at 680. The English cases reach much the same result, through using the concept of an obligation of reasonable and bona fide performance. *Paula Lee Ltd. v. Robert Zehil & Co. Ltd.*, [1983] 2 All E.R. 390 (Q.B.D.); And *So To Bed Ltd v. Dixon*, [2001] F.S.R. 47 (Ch.D.).

9. For cases near the line, compare *Zilg*, 717 F.2d 671, with *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918 (2d Cir. 1977), both concerning publisher nonpromotion issues.

10. In *Wood v. Lady Duff-Gordon*, as it happened, the best efforts obligor was male and the promisee female. I will stick to this arbitrary scheme here.

strict:<sup>11</sup> nevertheless, they may—as appears below—raise different issues of damages.

Again, many agreements involving promotion of a product involve defendants who may well have competing products on their books as well. A straightforward example is book-publishing agreements, where publishers may well be promoting several broadly similar books on the same subject. How far is it a breach of such an agreement to promote another book with the knowledge that in a limited market its sales are likely to be at the expense of the plaintiff's opus? The answer is not particularly comfortable for plaintiffs; although under the general good faith obligation a decision of this sort may be wrongful when wholly unjustifiable or prompted by non-business consideration such as pique,<sup>12</sup> generally speaking, the possibility of competing works is a hazard that has to be borne by the author.<sup>13</sup>

It is also worth noting that defendants' obligations can also be affected in this respect by the exact terms of the promotion agreement. Publishing agreements, for example, normally contain not simply a best-efforts obligation but a term giving the publisher a wide discretion as to the means of promotion (or indeed whether to publish at all); and although such clauses are to some extent read down by reference to good-faith concepts,<sup>14</sup>

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11. E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1 (1984). Accord *R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc.*, 945 F.2d 269 (9th Cir. 1991) (concerning the sale of goods, but seller only obliged to use best efforts to procure the goods, not supply them, come what might).

12. See *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co.*, 281 N.E.2d 142 (N.Y. 1972) (rival book commissioned and pushed after acrimonious argument with author).

13. This issue commonly arises in cases concerning best efforts obligations to promote in patent or other licensing agreements. See *Thorn Wire Co v. Washburn & Moen Co.*, 159 U.S. 423, 449 (1895); see also *American Mach. & Metals, Inc. v. De Bothezat Impeller Co.*, 180 F.2d 342 (2d Cir. 1950); *Arnold Prods. v. Favorite Films Corp.*, 176 F. Supp. 862 (S.D.N.Y. 1959).

14. See *Doubleday & Co. v. Curtis*, 763 F.2d 495, 501 (2d Cir. 1985) (express right of refusal to publish only exercisable "provided that the termination is made in good faith, and that the failure of the author to submit a satisfactory manuscript was not caused by the publisher's bad faith"); see also *Zilg*, 717 F.2d at 680. On the other hand, applying this criterion can be difficult. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369 (1980) ("Neither courts nor commentators have articulated an operational standard that distinguishes good faith performance from bad faith performance.").

they still have the effect of reducing the obligations of the defendant still further.<sup>15</sup>

The implications of all this for any hypothetical litigation about promotion of the Lucile fashion range are obvious: if Otis Wood had found that promoting the range would involve disproportionate expenditure as against other more saleable lines, or had simply been running a line in direct competition with it, Lady Duff-Gordon might have faced some difficulty.

## II. Damages

The above points are admittedly matters of construction of the obligation allegedly broken, rather than of the measure of damages. But even assuming we know the content of the obligation, and breach is clear, the measure of damages is still awkward. These may arise at two stages: quantification as a matter of principle and proof.

### A. *The Quantification of Recovery*

At least three possible issues arise here: the indeterminacy of the obligation, proof and possible alternative measures of damages. The latter point, admittedly an important one, we will leave until later, and assume for the present that the basis on which the plaintiff makes her claim is the orthodox expectation measure—that is, the plaintiff's share of the profits that would have arisen from proper performance.<sup>16</sup> Assuming this is the theory on which the plaintiff sues, these would-be profits, are in practice, likely to be not only the measure, but also the limit of her recovery. Although on principle there is no reason to deny recovery for other consequential losses, such as the collapse of the plaintiff's entire business, arising from failure to promote her wares properly, in practice it is suggested that such losses are likely to be too remote to be recovered. Only if the plaintiff could prove pretty specific knowledge of the circum-

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15. *E.g.*, *Ekern v. Sew/Fit Co.*, 622 F. Supp. 367 (N.D. Ill. 1985) (despite best efforts obligation, wide discretion clause allowed publisher to drop book for bona fide business reasons).

16. "In simple terms, the measure of the damage [for failure to use best efforts] is the amount necessary to put the injured party in the exact position he would have been if the contract had not been breached." *Perma Research & Dev. v. Singer Co.*, 542 F.2d 111, 116 (2d Cir. 1976), *cert. denied*, 429 U.S. 987 (1976).

stances likely to lead to such losses would she have much chance of recovering them.<sup>17</sup>

(a) A Promisor's Choice as to How to Perform: The "Minimum Entitlement" Rule

The first difficulty with best endeavors obligations is the fact that the duties they put on the promisor are *ex hypothesi* pretty open-ended. In the nature of things it is more an art than a science to market a product, promote a business, sweet-talk a third party into granting a license or permit or do whatever else forms the subject of a duty to do one's best to achieve a particular result. There are likely to be several acceptable ways of doing the job, the choice between which depends on issues of business judgment which courts are notoriously unwilling to second-guess. And while it may be easy enough to show that a defendant is in breach, because he has not used any of them (where, for example, he has made no efforts at all, best or otherwise, to achieve the desired aim), in order to prove her loss the plaintiff must compare her position to what it would have been had the contract been kept—i.e. had best efforts been shown.<sup>18</sup>

But what if there were a number of different ways of performing the contract while still showing best endeavors? Which one is the reference point? A modest investment leading to modest profits, or a substantial expenditure of revenue and management time with correspondingly greater returns? The general rule in contract law, on both sides of the Atlantic, is remarkably defendant-friendly. If a contractor has a choice as to how to perform a contractual obligation, then in the case of nonperformance, the measure of damages is based on the minimum right to performance the promisee had: that is, the least burdensome of the defendant's options.<sup>19</sup>

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17. See *Kenford Co. v. County of Erie*, 537 N.E.2d 176 (N.Y. 1989) (concerning a contract to build and run a stadium that plaintiff would have managed, the would-be rise in value of plaintiff's surrounding land was too remote).

18. *Bloor v. Falstaff Brewing Corp.*, 454 F. Supp. 258, 280 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979).

19. See *Liberty Bank v. Talman Home Mortgage Corp.*, 877 F.2d 400 (5th Cir. 1989); see also *Thornett & Fehr v. Yuills Ltd.*, [1921] 1 K.B. 219 (U.K.). Also on point is the classic English "failure to publish" case of *Abrahams v. Herbert Reiach Ltd.* [1922] 1 K.B. 477, 482 (U.K.), where Scrutton L.J. put the point starkly but

It seems to follow that the plaintiff is only entitled to the profit she would have made had the defendant done the very minimum he could have got away with while still avoiding breach (assuming of course that the defendant is smart enough to provide testimony as to the various non-burdensome business options that would have been open to him). This is likely to be a highly significant limitation in the case of promotion contracts, especially if the courts accept the view<sup>20</sup> that a defendant with a number of products to promote is not bound to privilege the plaintiff's interests and is entitled to apportion resources as he would within his own business. Thus were the facts of *Wood v. Lady Duff-Gordon* itself to arise today, and were it the case that a reasonable businessperson might well downplay the Lucile designs in comparison with others being promoted, the scope for damages would be, to say the least, somewhat constricted.

(b) The Effect of Subsequent Events

Even assuming that the defendant does not manage to drive down the damages using the argument from choice as to the means of performance, this is not the only hazard awaiting the plaintiff. Most agreements of the *Wood v. Lady Duff-Gordon* type are for a limited period;<sup>21</sup> even if this is not explicitly stated, a term will almost certainly be implied allowing for their termination on reasonable notice. Moreover, in addition to this, such agreements may well also allow for termination in other stated eventualities, for example where the promisee's ability to produce goods or otherwise perform her part of the bargain is adversely affected, or the promisor is taken over by a competitor of the promisee. In cases such as this, the rule that a contractor is not liable in damages for failing to do that which he or she never promised to do may well be important. Thus with a fixed-term contract, it is suggested that the promisee cannot be entitled to damages for more than that period, even if it is clear that, had the promisor chosen to provide those best

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logically: a contractor, he pointed out, should not be made liable in damages for not doing that which he had not been obliged to do in the first place.

20. *E.g.*, *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1373 (7th Cir. 1990).

21. The agreement in that case was for one year, terminable thereafter on ninety days notice. *Wood v. Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917).



efforts, he would in fact have renewed the agreement. And where there is a provision for reasonable or fixed notice of termination, it is tentatively suggested that a similar result should follow.

If the defendant could have cancelled the agreement on, say, three months' notice (or, in the absence of a stipulated period, on reasonable notice), then it is highly arguable that that period ought to be the maximum in respect of which damages are available. In other words, the period of profits in respect of which damages are awarded should run only until the earliest occasion when the defendant could have terminated the contract anyway.<sup>22</sup> The case here is rather like that of a promise of at-will employment. Even if an employer breaks a valid contract to hire an employee in the future, the plaintiff's damages for lost pay are in most states set at nil, on the basis that the employer has the right to fire at will and hence, whatever her actual loss, the employee has lost nothing *to which she was contractually entitled*.<sup>23</sup> Yet again, if any other subsequent event occurs which would have justified the defendant in putting an end to the arrangement had it still been subsisting, it is suggested that that event will also limit any damages available to the plaintiff.<sup>24</sup>

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22. So held in a series of franchise cases, which raise analogous issues. *Martin v. U-Haul Co. of Fresno*, 251 Cal. Rptr. 17 (Cal. Ct. App. 1988); *Hentze v. Unverfehrt*, 604 N.E.2d 536 (Ill. App. Ct. 1992).

23. *See Pepsi-Cola General Bottlers, Inc. v. Woods*, 440 N.E.2d 696 (Ind. App. Ct. 1982); *see also Ewing v. Board of Trustees of Pulaski Mem'l Hosp.*, 486 N.E.2d 1094, 1098 (Ind. App. Ct. 1985). It is true that in such cases the plaintiff often succeeds under a theory of promissory estoppel, for example *D & G Stout, Inc. v. Bacardi Imports, Inc.*, 923 F.2d 566 (7th Cir. 1991), but this is of no use here, since the measure of recovery is normally limited to reliance losses such as removal expenses and is most unlikely to cover profits foregone, for example *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981). *Accord* RESTATEMENT [SECOND] OF CONTRACTS § 90, cmt. d. illus. 8 (1981).

24. If the event was foreseeable at the time of the breach, this seems relatively uncontroversial. *See Sheldon v. Munford, Inc.*, 950 F.2d 403 (7th Cir. 1991) (involving a franchise agreement where the court takes into account the defendant's right to terminate if plaintiff's lease is not renewed). If the event was fortuitous and unexpected, matters are less clear, since if damages are measured as of the time of breach then there is an argument for not taking subsequent events into account.

## (c) Causation

A plaintiff in the position of Lady Duff-Gordon claiming damages for breach of a promotion or other best-efforts contract is also not unlikely to face problems connected with causation. Lady Duff-Gordon, it is worth noting, at the time had her own fairly successful business presence on New York's East Side, which she had opened in 1910.<sup>25</sup> Suppose she had alleged lost profits on the basis that Mr. Wood had failed properly to promote couture bearing her seal of approval. It would always have been open to Mr. Wood to argue that at least some of the customers he had failed to drum up had not been lost at all, but instead had simply bought the real thing from her instead: a scenario which seems not implausible if those customers had heard of her and were attracted by her touch.

Mr. Wood could, of course, also have argued that the alleged profits would not have been made even if he had promoted the Lady Duff-Gordon name impeccably; the products might simply not have sold because of consumer prejudice, a lack of ready cash in the right hands or whatever.<sup>26</sup> But while this is strictly speaking a causation issue, it also raises more complex points, which will be dealt with below under the rubric of proof.

B. *Problems of Proof*

A plaintiff wanting damages for a breach of contract must not only suffer a loss: it is hornbook law that she must also prove it. In the context of a best efforts obligation to promote, this means that she must prove that she would have made extra profits had the defendant fulfilled his obligation, and also provide some convincing evidence of what those profits would have been. Once again, the hurdles she faces may be more substantial than one might have thought.

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25. The store was at 19 E. 54th St. The success, incidentally, did not last, and the business collapsed in 1921. See *Lucile's Creditors Force Receivership*, N.Y. TIMES, March 21, 1922.

26. *E.g.*, *Nat'l Data Payment Sys. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000).

## (a) Would There Have Been Profits?

We can begin with the most basic problem: how does a best-efforts plaintiff go about proving to a jury her would-be gains? If she is well-entrenched in her business and her wares have a proven track record of sales, this may not be too difficult—but this will not always be the case. In particular, where her venture is new or relatively unestablished, this venture into the realms of the what-if may cause heartaches. Some state courts, it is worth remembering, hold almost as a matter of law that a previous profitable track record is a necessary element of proof of profits and that, absent this, projections of putative profits are too speculative to allow any recovery.<sup>27</sup> Although most states stop short of such an uncompromising approach, and simply go back to the general common law principle that damages must be proved with reasonable certainty,<sup>28</sup> nevertheless they do recognize that, as a matter of commonsense, the would-be profits of a new business need to be proven with a good deal more specificity.<sup>29</sup> Moreover, it logically follows that the same reasoning applies to more particular issues. For example, in a suit for failing to promote a collection of products the fact that a particular new line is untried and is subject to the vagaries of consumer taste has been taken to mean that damages cannot be had for the loss of the opportunity to exploit that line because they fail to be regarded as too speculative.<sup>30</sup> The effect of this in

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27. See *A & P Bakery Supply & Equip. Co. v. Hawatmeh*, 388 So. 2d 1071 (Fla. Dist. Ct. App. 1980); see also *Drs. Sellke & Conlon, Ltd. v. Twin Oaks Realty, Inc.*, 491 N.E.2d 912 (Ill. App. Ct. 1986).

28. "The damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of intervening causes." *Kenford Co. v. County of Erie*, 493 N.E.2d 234, 235 (N.Y. 1986). See also *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353 (7th Cir. 1996).

29. See *Handi Caddy, Inc. v. American Home Prods. Corp.*, 557 F.2d 136 (8th Cir. 1977) (explicitly drawing a distinction between new versus established ventures). See also *Gold v. Ziff Commc'ns Co.*, 748 N.E.2d 198 (Ill. App. Ct. 2001) (applying New York law and reasoning that a lack of a track record triggered the need for greater scrutiny).

30. See *Western Pub. Co., Inc. v. MindGames, Inc.*, 944 F. Supp. 754 (E.D. Wis. 1996) (applying Arizona law and denying claims for lost profits arising from alleged underpromotion of board game). See also *Eastern Fed. Corp'n v. Avco-Embassy Pictures, Inc.*, 326 F. Supp. 1280 (N.D. Ga. 1970), *modified*, 331 F. Supp. 1253 (1971) (awarding lost profits from showing movie in three theaters granted for two already open, but not for third which was about to open).

putting a downward pressure on the damages available to plaintiffs such as Lady Duff-Gordon is obvious.

(b) Profits, Chances and the Vagaries of Business

Quite apart from the evidentiary difficulties in proving that there would have been any profits at all, there is another problem that rears its head in many best efforts contexts. The difficulty is this: how does a court go about awarding damages when it is uncertain whether profits would have been made in any particular instance, and all that can be shown is a chance—even a fairly well-quantified one—that they would have been forthcoming? With ongoing obligations to carry out a general sales promotion such as that in *Wood* itself, this gives rise to few difficulties. As any salesperson will confirm, in any continuous sales pitch you win some and lose some. This fact is built into the idea of periodic profit. It thus follows that if the plaintiff can provide convincing evidence that her business had in fact been likely to show a given rate of profit over a given period, taking into account the chances of success or failure in closing particular deals, then that will provide the measure of damages.<sup>31</sup> But not all best efforts agreements take this form. They may instead involve a promise to use best efforts to obtain a particular discrete result. For example, an agreement for a lease could contain a promise by the lessee to use best efforts to obtain zoning or other consents, or by the lessor to terminate an existing lease of the same property. Again, a contract for the sale of stock or corporate acquisition agreement may require the buyer to show best efforts to consummate some step, such as registration or approval by the SEC or state authorities, or to get some permit or license from a third party to regularize the transaction and give it effect. Indeed, strictly speaking, a similar analysis will apply to many cases involving a suit for professional malpractice, as where a lawyer or other professional undertakes to use best efforts to win a lawsuit or implement a particular transaction.

Transactions of this “discrete results” type, it is suggested, break down yet again into two forms. In the cases just de-

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31. *E.g.*, *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 115 F.2d 268, 273-74 (3d Cir. 1940), *rev'd on other grounds*, 313 U.S. 487 (1941).

scribed, the showing of best efforts is of the essence of the obligation itself: the defendant has promised to try his best to do or achieve Result X (or whatever other formulation we choose to adopt in order to characterize best efforts). But this will not always be so. Take an agreement for a lease where the lessor promises to make the property available, or for that matter a seller agrees to deliver goods, on a given date; but a best efforts clause is appended exonerating him if he fails to do so despite having tried his best.<sup>32</sup> Here the best efforts component is not really part of the promise at all, but merely a limitation on what would otherwise be a strict-liability obligation. In other words, in the first class of agreements the defendant promises to use best efforts to achieve Result X; but in the second, he promises to achieve Result X, subject only to a clause exonerating him if his failure to do so is due to matters beyond his control. Although the distinction may seem narrow, arguably it ought to be significant.

As regards the latter category, where "best efforts" qualifies the obligation rather than defining it, it is suggested that damages are not a difficulty. The primary obligation is to achieve the promised result: because of this, the damages are the same as they would have been for breach of an unqualified obligation, except that the defendant can avoid paying them if he can show that he applied his best efforts (or possibly that, even if he did not, the result would not have been achievable even if he had done so).<sup>33</sup>

The first category is more awkward, because although the breach of the obligation may be clear (the defendant did not try his best, which is what he promised to do), its consequences in terms of loss are not, since it is generally uncertain what would have happened if the defendant had not broken his promise. Would the zoning consent have been granted, or would the existing tenant have vacated the property, if the defendant had tried harder? The chances are, we do not (and indeed can not) know for certain.

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32. See *R.B. Matthews, Inc. v. Transamerica Transp. Servs., Inc.*, 945 F.2d 269 (9th Cir. 1991).

33. Never, as far as the author has been able to ascertain, decided as such: but it has been clearly assumed. See *Madison Fund, Inc. v. Charter Co.*, 427 F. Supp. 597 (S.D.N.Y. 1977); see also *R.B. Matthews*, 945 F.2d 269.

In this situation, where we are talking of the valuation of a promised performance, there is much to be said for applying a “loss of a chance” approach—as applied elsewhere, for example in tort recovery for lost earnings. There, once we know the defendant has wrongfully made it impossible for the plaintiff to work, the value of what she has lost is set at the total sums she might have earned, discounted by the chance that she might not have earned them (as a result of accident, disability, layoff or whatever). Logically, exactly the same reasoning should apply to breach of an obligation to achieve a particular result: the loss suffered by the plaintiff should be the value of the result the defendant ought to have tried to bring about, multiplied by the chances of success. English courts have an extended jurisprudence on “loss of chance” recoveries of this sort,<sup>34</sup> far wider than in most U.S. jurisdictions,<sup>35</sup> and it is pretty clear that they would apply this jurisprudence in most one-off best efforts

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34. Most United States students will be painfully familiar with *Chaplin v. Hicks*, [1911] 2 K.B. 786 (U.K.), the beauty contest case. This, of course, is paralleled in a number of United States cases. See *Mange v. Unicorn Press, Inc.*, 129 F. Supp. 727, 730 (S.D.N.Y. 1955); *Van Gulic v. Res. Dev. Council for Alaska*, 695 P.2d 1071 (Alaska 1985); RESTATEMENT [SECOND] OF CONTRACTS § 346(3) (1981). But in England the matter goes much further. Since the very significant decision of the Court of Appeal in *Allied Maples Group Ltd v. Simmons & Simmons*, [1995] 4 All E.R. 907 (Eng.), it has been clear that such an approach will be used in almost any case where the evaluation of the results of a defendant's wrong depends on the hypothetical decision of some third party. That was a legal malpractice case where lawyers for the buyer of a business negligently failed to write into the acquisition contract a warranty against undiscovered liabilities. The law firm argued that it had not been proved that such a clause, even if included, would have got past the seller's lawyers. The court neatly sidestepped the issue and set damages at the amount of the offending liabilities, discounted by the chance (50 percent) that the seller's lawyers would have refused to agree to such a clause if it had been put to them.

35. For example, since the 1950s English courts have steadfastly refused to set up a “trial within a trial” where lawyers negligently bungle a lawsuit. Instead they simply award the now plaintiff the amount she would have obtained multiplied by her would-be chances of recovering it. See *Kitchen v. Royal Air Forces Ass'n*, [1958] 2 All E.R. 241 (Eng.); see also *Harrison v. Bloom Camillin*, [2001] P.N.L.R. 195 (Eng.). This in stark contrast to the prevailing American approach, which demands that the plaintiff prove on a balance of probabilities that she would have won, and thus effectively try the case again. See *Sheppard v. Krol*, 578 N.E.2d 212, 217 (Ill. App. Ct. 1991); see also *Daugert v. Pappas*, 704 P.2d 600, 605 (Wash. 1985) (*en banc*). The same contrast goes for collectability. Compare *Brinn v. Russell Jones & Walker*, [2002] EWHC 2727 (Q.B.) (applying the English “loss of chance approach”), with 2 *Mallen & Smith, Legal Malpractice* § 24.12 (5th ed.) (discussing the “all or nothing” United States view).

cases. For example, in one unreported case<sup>36</sup> Justice Longmore in the High Court did exactly that in the case of breach of a promise to use best endeavors to obtain zoning consent: the plaintiff recovered the would-be gain in value of its property if zoning consent had been forthcoming, reduced by the percentage chances that it might not in fact have been got.<sup>37</sup> In most American jurisdictions, by contrast, it is interesting to note that this question of indeterminacy has not unduly worried the courts. They have fairly consistently taken the view that the relevant loss for which the plaintiff wants reparation is the failure to achieve the stated result (not the loss of the chance of success), and thus that the question of liability is an ordinary causation issue. If the plaintiff can prove that it is more likely than not that best efforts would have produced the desired result she recovers in full:<sup>38</sup> if she cannot, she gets nothing.<sup>39</sup>

### III. Other Measures of Damages

From this analysis, it is clear that a plaintiff trying to recover on an expectation basis for breach will often face major difficulties, but there may be ways around this.

To begin with, take a plausible variant on *Wood v. Lady Duff-Gordon*. Assume (1) that the contract there required Lady Duff-Gordon to bear the expenses of manufacturing a line of couture that Mr. Wood was then to use his best efforts to sell for her benefit; and (2) that she then sued Mr. Wood for failing to promote it properly. Although it may be unclear, for one reason or another, what profits from exploitation would in fact have accrued to her, there is general acceptance that a plaintiff in a situation such as this can elect instead to claim reliance losses

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36. *Motor Crown Petroleum Ltd v. S J Berwin & Co.*, [2000] EWCA (Civ) 70 (Eng.).

37. *Id.*

38. Which she would not in England. There, the "loss of chance" jurisprudence cuts both ways and can be invoked by the defendant as much as the plaintiff: thus a plaintiff who shows a 75 percent likelihood that best efforts would have succeeded still only recovers on a 75 percent basis. See *Stovold v. Barlows*, [1996] P.N.L.R. 19 (Eng.). To this limited extent it must be admitted that the American plaintiff may do better than her English counterpart.

39. *E.g.*, *Nat'l Data Payment Sys. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000).

in the form of wasted expenditure.<sup>40</sup> Indeed, it is often argued that this right is specifically meant to provide a lifeline to a plaintiff who may face difficulties in proving an expectation loss.<sup>41</sup> To the extent that this is right, this may allow her to change tack and recover on the basis of the wasted manufacturing costs.<sup>42</sup> Moreover, this could be significant in a fair number of cases. Having contracted for financial advisers to use their best efforts to obtain finance for a project, a plaintiff may borrow money and incur substantial interest charges on it;<sup>43</sup> a lessee may have spent money preparing to move, or even moving, into a property in reliance on the lessor's promise to do its best to obtain zoning consent, and so on.

Of course, this does not necessarily give Lady Duff-Gordon or other potential plaintiffs in her position quite the free lunch that first appears. This is for two reasons. First, although a plaintiff is allowed to claim on the basis of her wasted expenditure, the defendant is generally allowed to reduce the amount he has to pay by reference to any overall loss the plaintiff would have suffered had the contract been fully performed.<sup>44</sup> Hence, whichever way you look at it, the aim is still to put the plaintiff in the position she would have occupied had the contract been

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40. E. ALAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.16 (3d ed. 2004); RESTATEMENT [SECOND] OF CONTRACTS § 344 (1981). See also *Wartzman v. Hightower Prods. Ltd.*, 456 A.2d 82 (Md. Ct. Spec. App. 1983).

41. "Where anticipated profits are too speculative to be determined, monies spent in part performance, in preparation for or in reliance on the contract are recoverable." *Wartzman*, 456 A.2d at 86. See also RESTATEMENT [SECOND] OF CONTRACTS § 348 cmt. a (1981).

42. See *Gruber v. S-M News Co.*, 126 F. Supp. 442 (S.D.N.Y. 1954) (the court reaches this result in the case of a best-efforts distribution contract). This jurisdiction is well-established in the case of breaches of franchise agreements. See *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948); see also *Montgomery Ward & Co. v. Tackett*, 323 N.E.2d 242 (Ind. Ct. App. 1975).

43. *McKinley Allsopp, Inc. v. Jetborne Int'l, Inc.*, 1990 U.S. Dist. LEXIS 12405, No. 89 Civ. 1489 (S.D.N.Y. 1990).

44. RESTATEMENT [SECOND] OF CONTRACTS § 349 (1981); see also *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182, 190-91 (2d Cir. 1949); *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638-39 (Tex. App. 1988); *Gruber*, 126 F. Supp. at 446. (involving a best efforts contract). For this reason, a number of commentators have pointed out that there is really no substantial difference between the expectation and reliance interests. See Michael B. Kelly, *The Phantom Reliance Interest In Contract Damages*, 1992 WIS. L. REV. 1755; see also David W. Barnes, *The Net Expectation Interest in Contract Damages*, 48 EMORY L.J. 1137, 1153 (1999).



kept: she never gets more than she has lost. And secondly, a reliance loss plaintiff continues to be potentially worse off than one who can actually prove the profits, since her award is capped at the amount of her expenditure even though she doubtless had hoped to make more. Nevertheless, the possibility of reliance damages is significant because it does make proof easier in practice. Essentially the award of reliance damages gives the plaintiff a presumptive buy in the first round of the legal knock-out, by assuming (absent proof *by the defendant* to the contrary) that she would at least have recouped the amount of her expenditure and thus broken even.<sup>45</sup>

It is also worth noting that there sometimes may be yet another way for a best efforts plaintiff to avoid the pitfalls of trying to prove hypothetical and often speculative profits against a defendant who refuses to do his part. By a nice irony, the 2002 California decision in *Chodos v. West Publishing Co.*<sup>46</sup> involved a successful attorney and would-be writer of legal treatises. Publishers commissioned a book on fiduciary duties from him on the usual terms as to best efforts to promote it once written.<sup>47</sup> The plaintiff wrote it in close liaison with their editors, only to have it dropped after submission because West<sup>48</sup> thought it would not sell.<sup>49</sup> Unable to prove would-be royalties lost, the plaintiff instead claimed the value of his services on the basis of a quantum meruit.<sup>50</sup> The court awarded \$300,000,<sup>51</sup>

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45. See Barnes, *supra* note 44, at 1153.

The law's goal is to get as close as possible to the award of net expectancy consistent with its standards of proof. The latitude given to claimants in proving lost profits evidences this concern. When it has been established that a significant loss has occurred, the proof of damages need not be mathematically precise; an approximation will suffice. . . . The award of costs incurred (expressed as reliance damages) . . . is simply the closest provable approximation of the net expectation amount.

*Id.*

46. 292 F.3d 992 (9th Cir. 2002) (applying California law), *aff'd*, 2004 U.S. App. LEXIS 4109 (9th Cir. 2004). See Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1206 (1995) (discussing this kind of recovery as a surrogate for recovery where expectation damages are too difficult to prove).

47. *Chodos*, 292 F.3d at 996-97.

48. With whom the original publishers, Bancroft-Whitney, had merged. *Id.* at 995.

49. *Id.* at 994.

50. *Id.* at 1000-01.

51. *Id.*

which was sustained on appeal on the basis that it was always open to a plaintiff faced with a repudiatory breach to claim the reasonable value of the services rendered.<sup>52</sup>

Admittedly awards of this sort have their limitations. A quantum meruit can only be claimed against a defendant who refuses to perform or commits a repudiatory breach, and not against one who merely performs badly or incompetently. Moreover, there must be some question over the court's determination that a plaintiff who had effectively performed in full could claim a quantum meruit.<sup>53</sup> Nevertheless, there may be one great advantage to the plaintiff. Whereas a plaintiff opting for reliance damages runs the risk of the defendant proving that she would have made a loss and docking the damages accordingly, it is not clear whether the same applies to a quantum meruit claim. Although the logical position is that a plaintiff should not be better off suing in unjust enrichment than she would have been in a suit on the contract<sup>54</sup> there is respectable authority to the contrary,<sup>55</sup> and there was certainly no suggestion in *Chodos* that the likely lack of success of the work in an already overcrowded market was relevant. If so, then—at least for plaintiffs' attorneys in California—the possibility of a quantum meruit claim may prove to be a powerful weapon in their armory.

#### IV. Conclusion

The conclusions of this paper can be briefly stated. Although the addition, whether expressly or by implication, of a best efforts clause to a contract may provide initial solace to plaintiffs, its potential for large awards of damages to the likes

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52. *Chodos v. West Publishing Co.*, 2004 U.S. App. LEXIS 4109 at \*4 (9th Cir. 2004).

53. A determination made on the rather curious basis that quantum meruit was only barred where the price payable was a contractual liquidated sum, and that a 15 percent royalty obligation was not liquidated. *Chodos*, 292 F.3d at 1001-03.

54. See Andrew Kull, *Restitution as a Remedy for Breach*, 67 S. CAL. L. REV. 1465, 1471-72 (1994). See also the proposed draft of the Restatement [Third] of Restitution § 38, which aims to prevent a plaintiff who has performed from getting more than the contract price by switching to a restitution theory of recovery.

55. The classic example is the decision in *Boomer v. Muir*, 24 P.2d 570 (Cal. Dist. Ct. App. 1933).

of Lady Duff-Gordon is limited. Nevertheless, their outlook is not as gloomy as it may seem, when the possibility is in account of ingenious attorneys invoking nonstandard measures of damages on behalf of their clients.